

IN THE SUPREME COURT OF PENNSYLVANIA

No. 7MM2012

IN RE: 2011 LEGISLATIVE REAPPORTIONMENT PLAN FOR THE PENNSYLVANIA
SENATE AND THE PENNSYLVANIA HOUSE OF REPRESENTATIVES

PETITION OF AMANDA E. HOLT, ELAINE TOMLIN, LOUIS NUDI, DIANE EDBRIL,
DARIEL I. JAMIESON, LORA LAVIN, JAMES YOEST, JEFFREY MEYER,
CHRISTOPHER H. FROMME, TIMOTHY F. BURNETT, CHRIS HERTZOG, GLEN
ECKHART, and MARY FRANCES BALLARD

BRIEF OF PETITIONERS

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I. STATEMENT OF JURISDICTION

This Honorable Court has exclusive appellate jurisdiction over the Petition for Review in this matter (the “Petition”) pursuant to Article II, Section 17(d) of the Constitution of Pennsylvania and the Act of July 9, 1976, P.L. 586, No. 142, effective June 27, 1978, as amended, 42 Pa. C.S. § 725(1). The Petition is addressed to the Court’s appellate jurisdiction and is in the nature of a Petition for Review pursuant to Rule 3321 and Rule 1501 et seq. of the Pennsylvania Rules of Appellate Procedure.

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

A. SCOPE OF REVIEW

This Honorable Court’s review extends to the Final 2011 Legislative Reapportionment Plan adopted by the 2011 Legislative Reapportionment Commission.

B. STANDARD OF REVIEW

Under the Constitution of Pennsylvania, Article II, Section 17(d), this Honorable Court reviews the Final 2011 Legislative Reapportionment Plan to determine whether the Final 2011 Legislative Reapportionment Plan is contrary to law. This Court undertakes a “plenary and non-deferential” review in adjudicating constitutional challenges. Pa. Turnpike Comm’n v. Com., 587 Pa. 347, 362-363, 899 A.2d 1085, 1094 (2006) (Castille, J.) (citations omitted).

III. CONTROLLING CONSTITUTIONAL PROVISION

Section 16 of Article 2 of the Pennsylvania Constitution (“Section 16”) states in relevant part:

The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

IV. DETERMINATION IN QUESTION

The determination in question is the Final 2011 Legislative Reapportionment Plan for the Pennsylvania Senate and House of Representatives ("Final Plan"), as adopted on December 12, 2011, at a public meeting of the 2011 Legislative Reapportionment Commission.

V. STATEMENT OF QUESTIONS INVOLVED

1. Whether the Commission's Final Plan for the Pennsylvania Senate, as a whole, is contrary to law and must be remanded pursuant to Section 17(d) of Article 2 of the Pennsylvania Constitution because it creates 95 divisions of Counties, 14 divisions of Municipalities, and 58 division of Wards that are not absolutely necessary in order to comply with population equality, compactness and contiguousness provisions of the Constitution and federal requirements and therefore violates Section 16 of Article 2 of the Constitution?

(Implicitly answered in the negative by the Commission.)

2. Whether the Commission's Final Plan for the Pennsylvania House of Representatives, as a whole, is contrary to law and must be remanded pursuant to Section 17(d) of Article 2 of the Pennsylvania Constitution because it creates 268 divisions of Counties, 270 divisions of Municipalities, and its 299 divisions of Wards, that are not absolutely necessary in order to comply with population equality, compactness and contiguousness provisions of the Constitution and federal requirements and therefore violates Section 16 of Article 2 of the Constitution?

(Implicitly answered in the negative by the Commission.)

3. Whether the Commission's Final Plan is contrary to law and must be remanded pursuant to Section 17(d) of Article 2 of the Pennsylvania Constitution because the Commission did not provide any explanation why the divisions of Counties, Municipalities and Wards created are absolutely necessary in light of evidence before the Commission that they were not all required

in order to obtain the level of population equality, compactness, contiguousness and consistency with the federal Voting Rights Act existing in the Final Plan.

(Implicitly answered in the negative by the Commission.)

V. STATEMENT OF THE CASE

A. FORM OF ACTION AND PROCEDURAL HISTORY

This is a Petition for Review of the Final 2011 Legislative Reapportionment Plan (“Final Plan”) of the 2011 Legislative Reapportionment Commission (“Commission”), established pursuant to Article II, Section 17(b) of the Constitution of Pennsylvania. The Commission conducted public hearings on September 7, 2011, September 14, 2011, and it held a public administrative meeting on October 31, 2011, at which time it adopted a Preliminary Reapportionment Plan (Preliminary Plan). Under Article II, Section 17(c) of the Constitution, any person aggrieved by the Preliminary Plan had 30 days after the filing of the Preliminary Plan, or until November 30, 2011. Petitioner Amanda Holt presented a Section 16 Plan to the Commission at a November 18, 2011 public hearing, attached as Exhibit C to the Petition. The exceptions to the Preliminary Plan on which this Petition is based were timely filed on or before November 30, 2011, attached as Exhibit D to the Petition.

The Commission held a public hearing again on November 23, 2011, and held public administrative meetings on December 7, 2011, and December 12, 2011, at which it adopted the Final Plan by a majority vote of 3 Commissioners to 2 Commissioners. The Commission did not address the filed exceptions in its public hearings, meetings, or Final Plan.

B. PRIOR DETERMINATION

The prior governmental determination in this case is the Final 2011 Legislative Reapportionment Plan adopted by the Commission on December 12, 2011, and filed on that date

with the Secretary of the Commonwealth of Pennsylvania. The Final Plan is not reported in an official case reporter. Relevant portions of the Final Plan and Map are attached to the Petition at Exhibits A and B.

C. AGENCY WHOSE DETERMINATION IS TO BE REVIEWED

The name of the agency whose determination is to be reviewed is the 2011 Legislative Reapportionment Commission.

D. FACTUAL CHRONOLOGY

Since the 1968 amendments to the Constitution of Pennsylvania in Article 2, Section 17(a), a Legislative Reapportionment Commission (“Commission”) has had the authority and obligation to redraw the lines of Pennsylvania Senate and House of Representatives districts following each decennial census.¹ The Commission consists of five members, four of whom are the Majority and Minority Leaders of the Pennsylvania Senate and the Pennsylvania House of Representatives, and the fifth of whom is a Chairman appointed by the four other members, or by the Supreme Court if they are unable to do so.

In reapportioning the legislative districts, the Commission must meet certain mandates. The first is that “[t]he Commonwealth shall be divided into fifty senatorial and two hundred three representative districts[.]” PA. CONST. art. II, § 16. The 2010 census determined that the population of Pennsylvania is 12,702,379. This means that the ideal population of each Senatorial district would be 254,048; the ideal population of each House district would be 62,573. The Commission’s Final Plan for the Senate had a range of deviation from this ideal population of 3.89% and the Final Plan for the House had a range of deviation of 5.98%.

¹ Before 1968, the full General Assembly had the constitutional obligation to reapportion the legislative districts.

1. Petitioners

Petitioners are voters in the Commonwealth of Pennsylvania who live in the Commonwealth's wards, municipalities, and counties the Final Plan split, often multiple times, to form Senatorial and/or House of Representative districts contrary to the constitutional mandate that no such division shall be made "unless absolutely necessary." They are:

- Amanda E. Holt of Allentown, whose county of Lehigh is split into eight House districts and three Senate Districts;
- Elaine Tomlin of Philadelphia, whose Ward 42 is split into five House districts and two Senate districts;
- Louis Nudi of Pittsburgh, whose Township of Ross is split into two House districts
- Diane Edbril of Radnor, whose County of Delaware is split into four Senate districts and whose Township of Radnor is split into two House districts;
- Dariel I. Jamieson of Chesterbrook, whose County of Chester is split into four districts;
- Lora Lavin of Swarthmore, whose County of Delaware is split into four Senate districts and whose Borough of Swarthmore is split into two House districts;
- James Yoest of Pittsburgh, whose Township of Ross is split into two House districts;
- Jeffrey Meyer of Pittsburgh, whose Township of Ross is split into two House districts;
- Christopher H. Fromme of Pittsburgh, whose Township of Ross is split into two House districts;
- Timothy F. Burnett of Pittsburgh, whose Township of Ross is split into two districts;

- Chris Hertzog of Coply, whose County of Lehigh is split into 8 House districts and whose Township of North Whitehall is split into two House districts;
- Glenn Eckhart of Allentown, whose County of Lehigh is split into eight House Districts and three Senate districts, and whose Township of Salisbury is split into three House districts; and
- Mary Frances Ballard of Wayne, whose county of Delaware is split into four Senate districts and whose Township of Radnor is split into two House districts.

2. Public Proceedings of the Commission

In the Commission's public proceedings leading to the adoption of the Final Plan, Petitioner Holt presented her original Section 16 Plan to the Commission on November 18, 2011, at public hearing and in response to the Preliminary Plan the Commission adopted on October 31. (Pet. ¶ 30.) She presented the Commission with a modified Section 16 Plan on November 30, 2011. (*Id.*) Holt's plans are attached to the Petition as Exhibits C and D, respectively. (Entitled "Legislative Reapportionment exceptions and Proposed Solutions" and also referred to as the "Holt Proposal.") Exhibit E to the Petition is a third modification of the Section 16 Plan, titled the Amended Section 16 Plan, which makes additional adjustments to eliminate the split of Lower Makefield Township, modify several district numbers, and reduce the size of one district to meet strict VRA requirements. None of the Section 16 Plans alter the total number of subdivision splits in the prior Section 16 Plans. (Pet. ¶ 30.) Each of these three "Section 16 Plans" at Exhibits C, D, and E, shows that, state-wide, Pennsylvania's voting districts can readily be reapportioned to account for population changes while still maintaining the constitutional mandates for legislative districting of equality of population, compactness, and contiguousness and respecting the constitutional mandate that no political subdivision be divided unless

absolutely necessary. The population and voting equality data for the third, or “Amended Section 16 Plan” is set forth in Exhibit G.

Each of the Section 16 Plans presented to the Commission and in the Petition to the Court has a 3.461% range of deviation from population equality per district state-wide for the Senate, lower than the 3.89% in the Final Plan; and the Amended Section 16 Plan has a 5.872% range of deviation from population equality per district state-wide for the House, lower than the 5.98% in the Final Plan. (Pet., Exs. C, D, E, G.) Prior Section 16 Plans were insubstantially different. (*Id.*)

3. Analysis of the Final Plan as a Whole

To analyze the Final Plan as a whole, the Section 16 Plans were designed by exclusively applying the constitutional factors of Article 2, Section 16 to the 2011 census data, existing Pennsylvania county, township, municipality, and ward lines, and considerations of contiguousness and compactness. (Pet. ¶ 29.) It did not consider other factors, such as preserving incumbency or enhancing partisan voting power. At the end of the analysis, it applied a factor for the Voting Rights Act, taking the following steps in turn:

- a. Keeping in mind the requirement for 50 senatorial districts and 203 representative districts, the 2010 Pennsylvania census population of 12,702,379 shows the ideal population of each senatorial district would be 254,048 and of each house district would be 62,573. (Pet. ¶ 29.a.)
- b. With the goal of keeping the same ideal population deviation range as the Final Plan, the Section 16 Plan compared each county and smaller subdivision to the ideal district population state-wide to determine the total number of senatorial and representative districts to which each subdivision is entitled

based on voting equality requirements. Subdivisions within the Final Plan population deviation from strict voting equality were kept intact. Subdivisions that exceed the population equality deviation were either combined with other contiguous subdivisions or split along the lines of existing interior subdivisions to maintain voting equality. (Pet. ¶ 29.b.)

- c. After creating state-wide senatorial and representative district maps that achieve voting equality with the least possible splitting of subdivisions, adjustments were made as necessary to ensure compliance with the Voting Rights Act (“VRA”), 42 U.S.C. § 1973. This step resulted in combining or splitting additional subdivisions, but only to the extent necessary to achieve VRA compliance. (Pet. ¶ 29.c.)
- d. All criteria used in preparing the Section 16 Plan are objective, transparent, readily verifiable, and based solely on the Pennsylvania Constitution or federal law. Exhibit F to the Petition sets forth the specific reason why each subdivision split under the Section 16 Plan was absolutely necessary. (Pet. ¶ 29.d.)

This comparison of the Final Plan with the Section 16 Plans illustrates specifically:

- a. The Final Plan for the House created a total of 837 subdivision splits, 453 more than the number of subdivision splits which were “absolutely necessary.” The number of subdivisions split by the Final Plan for the House totaled 290, 184 more subdivisions than would have been split if the Final Plan complied with Section 16. (Pet. ¶ 30.a. & Ex. F)
- b. The Final Plan for the Senate created a total of 167 subdivision splits, 93 more than the number of subdivision splits which were “absolutely necessary.” The number of

subdivisions split by the Final Plan for the Senate totaled 58, 31 more subdivisions than would have been split if the Final Plan complied with Section 16. (Pet. ¶ 30.b. & Ex. F)

The Commission's Answer does not challenge the accuracy of these calculations and or the documents, attached as exhibits to the Petition, on which these calculations are based. *See* Ans. ¶¶ 28-30.

E. DETERMINATION UNDER REVIEW

The determination under review is the determination of the 2011 Legislative Reapportionment Commission adopting the Final 2011 Legislative Reapportionment Plan on December 12, 2011 ("Final Plan").

F. STATEMENT AS TO PRESERVATION OF ISSUES

Objections to the Preliminary Plan were filed by exception with the Commission on November 30, 2011, pursuant to Article 2, Section 17 (c) of the Constitution of Pennsylvania. The Commission implicitly denied the exception by deciding not to change the vast majority of the splits of political subdivisions present in the Preliminary Plan when approving by a 4 to 1 vote the Final Plan on December 12, 2011.

SUMMARY OF ARGUMENT

The Commission's Final Plan of reapportionment must be overturned because it is contrary to law. In direct violation of fundamental constitutional precepts, the Final Plan makes mincemeat of the political subdivisions of this Commonwealth. On a pervasive, state-wide scale, the Final Plan shreds counties, townships, municipalities, and wards all across the Commonwealth into hundreds of voting districts that are *completely unnecessary* to comply with the population equality, compactness and contiguousness provisions of the Constitution and federal requirements under the Voting Rights Act of 1964 (VRA). In fact, the Final Plan makes 453 *more* subdivision splits for the House and 93 *more* subdivision splits for the Senate than the

number of splits which are “absolutely necessary” to achieve those overriding constitutional objectives. As a result, the Final Plan –as a whole—violates the unambiguous requirement of Section 16 of Article 2 of the Pennsylvania Constitution that *no* political subdivisions be divided “*unless absolutely necessary.*”

Petitioners are Republicans and Democrats who have joined together to defend the language of the Constitution, rather than the interests of either party. They have shown by state-wide analysis of the Final Plan that the Commission could have easily satisfied *all* valid constitutional requirements while reducing the number of split subdivisions *by more than 50 percent*. The Commission’s answer did not dispute *any* of the averments of fact in Petitioner’s verified Petition with respect to the number of unnecessary splits caused by the Final Plan. Instead, the Commission’s response to the Petition asserts that all alternative plans must be disregarded, and that *only* its Final Plan may be considered. That assertion flatly contradicts both the plain language of Section 16 and this Court’s precedent, not to mention common sense. As matter of simple logic, the *only* way to determine whether a division is “absolutely necessary” is to ask whether alternatives exist that enable the Commission to avoid the division. The Commission’s position would literally write Section 16 out of the Constitution for once and for all, and eliminate this Court’s power to review reapportionment plans for compliance with Section 16. The Commission’s usurpation of power must be rejected. The Final Plan must be remanded.

ARGUMENT

I. STANDING

Any aggrieved person may file an appeal from the Final Plan “directly to the Supreme Court within thirty days after the filing thereof.” Pa. Const. art. II, § 17(d). In Pennsylvania, the test for standing requires a “direct interest in the subject matter of the particular litigation” and in

a challenge to reapportionment, “the right to vote and the right to have one’s vote counted “ is the subject matter of the litigation. Albert v. 2001 Legislative Reapportionment Commission, 567 Pa. 670, 678-79, 790 A.2d 989, 994-95 (2002), *quoting* William Penn Parking Garage, Inc. v. Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280 (1975). Thus, all the petitioners herein have standing as they are registered voters in the Commonwealth and they each live in a political subdivision that was unnecessarily divided under the Final Plan.

II. THE COMMISSION’S DECISION IS CONTRARY TO LAW BECAUSE IT FAILED TO FOLLOW THE PENNSLVANIA CONSTITUTIONAL MANDATE NOT TO DIVIDE COUNTIES, MUNICIPALITIES, TOWNSHIPS OR WARDS “UNLESS ABSOLUTELY NECESSARY”

A. STANDARD OF REVIEW

Article II Section 17 authorizes this Court’s review of the Final Plan to ensure that it is not contrary to law. PA. CONST. art. II, § 17(d). This review requires the Court to determine whether the final plan satisfies the constitutional mandates that the districts, in both houses of the state legislature, are as nearly of equal population as is practicable and that no political subdivision shall be divided in forming such districts as absolutely necessary. Albert, 567 Pa. at 679, 790 A.2d 995.

The standard of “contrary to law” does not impose a high burden upon Petitioners. If the Commission’s decision ignores a legal mandate in the Commonwealth without explanation and justification in the law, its act is contrary to law.

In determining whether the Final Plan is contrary to law, the Court must compare the Commission’s decision to the Pennsylvania constitutional mandates for apportionment and redistricting. In this Court’s 2002 decision regarding challenges to the 2011 reapportionment, three Justices expressed concern that the Court should not occupy an unduly passive role in the

vindication of the unambiguous state constitutional requirements of compactness and integrity of political subdivisions. Albert, 567 Pa. at 688, 790 A.2d at 1000 (Saylor, J., concurring). Petitioners submit that the Final Plan, when illuminated by the three Section 16 alternatives, is contrary to the Constitutional mandate that counties, townships, municipalities, and wards not be divided “unless absolutely necessary.” The Final Plan thus must be overturned and remanded with instruction to comply with this legal mandate of Article II, Section 16.

**B. LEGISLATIVE HISTORY OF THE CONSTITUTIONAL
PROVISION IN QUESTION SHOWS FUNDAMENTAL INTEREST
IN PRESERVING POLITICAL SUBDIVISIONS**

Before 1968, the Pennsylvania Constitution contained an absolute prohibition against the division of political subdivisions in drawing Senatorial districts – “No ward, borough, or township shall be divided in the formation of a district.” Reference Manual No. 1 – Legislative Apportionment, The Pennsylvania Constitutional Convention (1968), at 55.² This legislative history demonstrates the Commonwealth’s long-standing recognition of the importance of maintaining the integrity of its municipal boundaries so as to “insur[e] some voice to political subdivisions, as political subdivisions.” Reynolds v. Sims, 377 U.S. 533, 580 (1964). The court in Butcher v. Bloom, 415 Pa. 438, 463, 203 A.2d 556, 558 (1964), stressed that “reapportionment ... must maintain the integrity of counties and other political subdivisions, insofar as possible. Id.; see also Reference Manual No. 6 – Legislative Apportionment, at 19-21, The Pennsylvania Constitutional Convention (1967-1968), Page 19-21 (quoting Butcher I).

In 1968, amendments created a narrow exception to the Constitution’s previous prohibition against dividing wards, boroughs or townships in the reapportionment process to

² Available at http://www.duq.edu/Documents/law/pa-constitution/_pdf/conventions/1967-68/reference-manuals/reference-manual01.pdf.

increase the ability of reapportionment to meet high levels of equality between and among districts and to incorporate the substantially equal population principle of Reynolds, 377 U.S. at 578; Com. ex. rel. Specter v. Levin, 448 Pa. 1, 7-9, 293 A.2d 15, 18 (1972). These amendments stated,

Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

Pa. Const. Art. II, § 16. During the debates at the 1968 Constitutional Convention, the delegates reiterated the importance of maintaining political subdivision boundary lines. Reference Manual No. 1, at 57 (1968) (noting that respecting the boundary lines of political subdivisions is the “principal non-population factor considered by the courts”). Delegate Powell stressed that “[p]eople are not so organized along the lines of legislative districts. To a large degree they are organized along the lines of political subdivisions.” Journal of the 1968 Constitutional Convention, at 532.³

C. THE COMMISSION’S ANALYSIS FLOUTS THE “UNLESS ABSOLUTELY NECESSARY” REQUIREMENT

A reapportionment plan is “contrary to law” if it “fails to meet constitutional requirements.” In re Reapportionment Plan for the P.a Gen. Assembly, 497 Pa. 525, 532, 442 A.2d 661, 665 (1981). Petitioners may satisfy their burden of showing the Final Plan is contrary to law by establishing that it violates Section 16 because, on a state-wide basis, the population principle and federal voting requirements can be satisfied without making the hundreds of unnecessary divisions that appear in the Final Plan. Levin, 448 Pa. at 10 n.23, 293 A.2d 19, n. 23 (citing Butcher, 415 Pa. at 463, 203 A.2d at 558). In Levin, this Court recognized that “if

³ Available at http://www.duq.edu/Documents/law/pa-constitution/_pdf/conventions/1967-68/journals/vol01-journals-01-40.pdf

necessary, any political subdivision or subdivisions may be divided or combined in the formation of districts where the [equality of]population principle cannot otherwise be satisfied.” Id. Thus, equality of population, compactness, contiguousness, and compliance with federal voting laws may satisfy the “absolutely necessary” standard.

To determine whether the “absolutely necessary” standard is satisfied, it is essential to ask whether the Final Plan, or any reapportionment plan, carved up more political subdivisions on a state-wide basis than it had to. Yet, in its Consolidated Answer to Petition for Review, the Commission posited that the Court’s “review of the Final Plan is limited to the four corners of the Final Plan itself and does not take into account any proposed alternative plans.” (Answer, para. G. 28.) This notion, tantamount to a declaration of non-reviewability, has been rejected by other courts in analogous contexts. A federal court reviewed another Pennsylvania reapportionment by the General Assembly challenged as contrary to the federal constitutional principle of “one-person, one vote” by considering four plans offered by the challengers. Some of those alternative plans had not been before the General Assembly when it enacted its redistricting plan. Richard Vieth, et al. v. Com. of Pa., 195 F. Supp. 2d 672, 675 and n. 3 (M.D. Pa. 2002).

Relying upon the United States Supreme Court, the Vieth court stated that the focus should be upon whether a compliant plan “was possible” and that could only be done by considering alternatives. Id., quoting Karcher v. Daggett, 462 U.S. 725, 734 (1983) Noting that if it “were to adopt the limited analysis suggested by the Defendants, we would be adopting a view that would isolate grossly disproportionate plans from constitutional scrutiny on the sole basis that such plans constitute the plan with the least deviation *available*. “ Id. Unless deviations are “unavoidable or resulted despite a good faith effort to draw districts of equal

population, then the Defendants must prove a legitimate justification for the deviations.” Id. The Court considered four alternative plans offered by the petitioners and found that the evidence “conclusively demonstrates that this population deviation was avoidable.” Id. at 675.

Pennsylvania case law in other contexts makes clear that language comparable to “unless absolutely necessary” must be applied as written and necessitates a compelling justification for action in question. For example, Pennsylvania law states that children will be removed from their parents “*only when necessary.*” 42 Pa. C.S. § 6301 (emphasis added). Applying its plain meaning, the Pennsylvania superior court faced with a lack of evidence of the necessity to remove a child from its home, would not do so even when it was in the best interest of the child not to live with either parent. Brooks-Gall v. Gall, 840 A.2d 993, 999 (Pa. Super. 2003) (emphasis added). In re K.D. held that “only when necessary” meant that the government could only intervene under 42 Pa.C.S. s. 6301 when “the government interest is significant *and* there is *no alternate reasonable method* of lesser intrusiveness to accomplish the governmental purpose.” In re K.D., 744 A.2d. 760, 760 (Pa. Super. 1999) (emphasis added) (referencing Denoncourt v. Com. of Pa., State Ethics Comm'n, 504 Pa. 191, 199-201, 470 A.2d 945, 949 (1983)).

A sister state, Colorado, imposes a similar restriction on dividing political subdivisions and has construed it to *require* consideration of “less drastic alternatives.” Colorado’s constitution states that “[e]xcept when necessary to meet the equal population requirements of section 46, no part of one county shall be added to all or part of another county in forming districts.” C.R.S.A. Const. Art. 5 s.47(2) (emphasis added). The Supreme Court of Colorado, disapproving a commission reapportionment plan, noted the plan was not “(1) sufficiently attentive to county boundaries . . .to meet state constitutional requirement . . .” and was not “(2)

accompanied by an adequate factual showing that less drastic alternatives could not have satisfied the equal population requirement of the State Constitution.” In re Reapportionment of Colo. Gen. Assembly, 45 P.3d 1237, 1248-49 (Colo. 2002) (emphasis added).

Thus, under the plain language of the Pennsylvania Constitution, this Court must reject the Commission’s argument that no alternative plans may be considered in evaluating whether the wholesale splitting of subdivisions in the Final Plan is “absolutely necessary.” The undisputed evidence before this Court clearly establishes that it is not, and that the Commission as acted contrary to law.

**D. THE UNDISPUTED EVIDENCE BEFORE THE COURT
DEMONSTRATES THAT THE FINAL PLAN CAUSES
PERVASIVE, STATE-WIDE SPLITTING OF SUBDIVISIONS
THAT IS NOT “ABSOLUTE NECESSARY”**

Consistent with the plain language of the Pennsylvania Constitution, Petitioners have prepared a state-wide analysis which undeniably shows that the subdivision splits proposed by the Commission are not “absolutely necessary,” or even marginally necessary, to achieve any constitutionally valid objective of the Commission, *because the same level of population equality, compactness and contiguity can be readily achieved while reducing both the number of places split, and the number of splits, in both houses by more than 50 percent.*

The following table, generated using the data attached hereto at Exhibit F to the Petition, shows a comparison between the total number of subdivision splits and split subdivisions under the Final Plan, and the total number of subdivision splits and split subdivisions that would have resulted if the Commission had prepared a plan in strict compliance with the requirements of Section 16 while maintaining the same level of population equality:

| <u>HOUSE</u> | <u>Final Plan</u> | <u>Section 16 Plan</u> | <u>Difference</u> |
|---------------------------------|-------------------|------------------------|-------------------|
| Split Counties | 52 | 45 | 7 |
| Split Municipalities | 108 | 27 | 81 |
| Split Wards | 130 | 34 | 96 |
| Total Split Subdivisions | 290 | 106 | 184 |
| Total County Splits | 268 | 229 | 39 |
| Total Municipal Splits | 270 | 84 | 186 |
| Total Ward Splits | 299 | 71 | 228 |
| Total Subdivision Splits | 837 | 384 | 453 |
| | | | |
| <u>SENATE</u> | <u>Final Plan</u> | <u>Section 16 Plan</u> | <u>Difference</u> |
| Split Counties | 28 | 21 | 7 |
| Split Municipalities | 4 | 2 | 2 |
| Split Wards | 26 | 4 | 22 |
| Total Split Subdivisions | 58 | 27 | 31 |
| Total County Splits | 95 | 58 | 37 |
| Total Municipal Splits | 14 | 8 | 6 |
| Total Ward Splits | 58 | 8 | 50 |
| Total Subdivision Splits | 167 | 74 | 93 |

These totally unnecessary splits were identified by reference to the Section 16 Plans prepared by Petitioners. The Commission does not contest any of Petitioners' verified averments as to the manner in which those plans were prepared or the factual conclusions to be drawn from the plans. The Section 16 Plans thus serve as a striking benchmark which demonstrates just how far short the Commission has fallen from the clear dictates of Section 16.

While the numbers above aggregate the Final Plan's unnecessary splits on a state-wide basis, the Court also should consider the numerous examples of individual subdivision splits which confirm that the Commission has not even attempted to follow Section 16. The Final Plan for the House split numerous subdivisions whose populations were *smaller* than the ideal House district population and therefore should not have been split at all, because no valid countervailing considerations necessitated a split. Among *many* other examples:

- The Final Plan split Lower Merion, Montgomery County into *four* House Districts even though it is only a -7.59% deviation from an ideal House district population, and required *no* splits.
- The Final Plan split Pittsburgh into *ten* House Districts, with the population to support only six Districts, and the ripple effect of dividing Ross Township unnecessarily.
- The Final Plan split Philadelphia Ward 42 into *five* House Districts even though it is only 52.26% of an ideal House district population and required *no* splits.
- The Final Plan split Philadelphia Ward 49 into *five* House Districts even though it is only 39.19% of an ideal House district population and required *no* splits.
- The Final Plan split Philadelphia Ward 54 into *four* House Districts even though it is only 38.16% of an ideal House district population and required *no* splits.
- The Final Plan split Philadelphia Ward 64 into *four* House Districts even though it is only 27.55% of an ideal House district population and required *no* splits.
- The Final Plan split Pottstown (in Montgomery County) into *three* House Districts even though it is only 35.76% of an ideal House district population and required *no* splits.
- The Final Plan split Swatara (in Dauphin County) into *three* House Districts even though it is only 37.34% of an ideal House district population and required *no* splits.
- The Final Plan split Unity (in Westmoreland County) into *three* House Districts even though it is only 36.13% of an ideal House district population and required *no* splits.
- The Final Plan split Salisbury (in Lehigh County) into *three* House Districts even though it is only 21.58% of an ideal House district population and required *no* splits.
- The Final Plan split South Whitehall (in Lehigh County) into *three* House Districts even though it is only 30.65% of an ideal House district population and required *no* splits.

The Final Plan for the Senate has many similar examples of subdivision splits that are completely unnecessary. Among *many* other examples:

- The Final Plan split Philadelphia Ward 18 into *three* Senate Districts even though it is only 5.75% of an ideal Senate district population. There are no equal

population, VRA or other requirements that justified even a single split, much less *three*.

- The Final Plan split Philadelphia Ward 21 into *three* Senate Districts even though it is only 17.44% of an ideal Senate district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.
- The Final Plan split Carbon into *two* Senate Districts even though it is only 25.68% of an ideal Senate district population. There are no equal population, VRA or other requirements that justified this split.
- The Final Plan split Adams County into *three* Senate Districts even though it is only 39.92% of an ideal Senate district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.
- The Final Plan split Butler County into *three* Senate Districts even though it is only a -27.63% deviation from the ideal Senate district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.
- The Final Plan split Washington County into *three* Senate Districts even though it is only a -18.20% deviation from the ideal Senate district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.

All of the above examples were described in paragraphs 37 and 38 of the verified petition, and not challenged by the Commission in its Answer.

The hundreds of political subdivision splits called for by the Final Plan cannot be explained by any permissible objective under Section 16 of the Constitution. Overall voting equality deviations are essentially the same for the Final Plan as the Section 16 Plan. (Pet. ¶ 32 & Ex. E). The Final Plan has ideal population deviations of 3.89% in the Senate and 5.98% in the House, while the Section 16 Plan has ideal population deviations of 3.471% in the Senate and 5.872% in the House. (*Id.*)

The splits under the Final Plan cannot be justified by compactness or contiguousness. The Section 16 Plan (Exhibit E) provides a significantly higher degree of compactness and

contiguity than the Final Plan. (Pet. ¶ 34.) The Final Plan creates seven non-contiguous districts for the House, while the Section 16 Plan (Exhibit E) creates one. (*Id.*)

The VRA's requirements that the Commission and this Court consider minority voting rights, however, cannot be the basis for the Final Plan's violation of the integrity of political subdivision boundaries. The Petitioners' Section 16 Plans increase the VRA compliance over that in the Commission's Final Plan. Indeed, the Final Plan has 14 minority-majority districts, whereas the Section 16 Plan (Exhibit E) creates 19, making it less vulnerable to potential challenge under federal law. And the Section 16 Plan (Exhibit E) does so with far fewer subdivision splits, preserving wards that are needlessly divided by the Final Plan.

Recognizing that "reapportionment is a legislative function," petitioners do not ask the Court to adopt any of the offered Section 16 Plans. In re Reapportionment, 497 Pa. at 532, 442 A.2d at 665. However, the Petitioners' Section 16 Plans unequivocally demonstrate that more than half of the proposed divisions in the Final Plan are not "absolute necessary" as required by Section 16. The Court should remand the Final Plan back to the Commission with instructions that they make "a second attempt at reapportionment" that complies with the plain language of Section 16 of Article 2 of the Pennsylvania Constitution. *Id.* The Section 16 Plans provide "objective and concrete data" that the Final Plan is "contrary to law." Levin, 448 Pa. at 19, 293 A.2d at 18. As one Supreme Court justice opined in 1981 "the fact that a better [reapportionment plan] may be easily designed which accommodates all of the constitutional concerns may strongly suggest the constitutional invalidity of the selected plan." In re Reapportionment Plan, 497 Pa. at 541, 442 A.2d at 669 (Nix, J., dissenting).

The Commission has no basis in the constitution or law to justify its disregard for the political subdivisions it divided. It offered no rationale for this Court to find anything other than its Final Plan is contrary to law.

E. THE SUPREME COURT'S PRIOR DECISIONS UPHOLDING PAST REAPPORTIONMENT PLANS ARE DISTINGUISHABLE AND SHOULD NOT CONTROL THE OUTCOME OF THIS APPEAL

This Court has presided over challenges to the Legislative Reapportionment Commission's Final Reapportionment Plan on four occasions since 1968. Albert, 567 Pa. 670, 790 A.2d 989; In re 1991 Legislative Reapportionment Commission, 530 Pa. 335, 609 A.2d 132 (1992); In re Reapportionment Plan, 497 Pa. 525, 442 A.2d 661 (1981); Levin, 448 Pa. 1, 293 A.2d 15, 18 (1972). None of these prior decisions, however, control the outcome of this appeal because each prior apportionment challenge is readily distinguishable from this one.

The reapportionment plan upheld in Levin was of a distinctly different character than the plan challenged today. The 1971 Legislative Reapportionment Commission strove to adhere to United States Supreme Court precedent "necessitating a closer adherence to equality of population." Levin, 448 Pa. 1, 293 A.2d at 11; Kirpatrick v. Preisler, 394 U.S. 526 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969). Accordingly, the 1971 plan was greatly superior to the 1966 plan with respect to population equality. The prior plan "allowed a deviation from the ideal of population equality of a maximum of 19.1% in senatorial districts and 30% in Representative districts, compared to 4.3% and 5.4%, respectively, in the [1971] plan." Levin, 448 Pa. 1, 293 A.2d at 22, n.2.

The Commission's 1971 plan achieved these population equality gains by dividing 36 political subdivisions in the House plan and 169 subdivisions in the Senate plan. The Commission's 2011 Reapportionment ("Final Plan") has similar population numbers – a 3.89 % deviation in the Senate and a 5.98% deviation in the House . Yet the 2011 Final Plan makes 167 and 837 divisions of political subdivisions in the Senate and House, respectively.⁴ The exponential increase in the number of divisions from 1971 to 2011 cannot be explained away by population shifts from 1970 until now. The Petitioners' Section 16 Plans show that the goal of population equality can be achieved with a substantial reduction from the Commission's number of divided municipalities.

The Supreme Court's opinions in In re Reapportionment Plan, 497 Pa. 525, 442 A.2d 661 (1981) and In re 1991 Legislative Reapportionment Commission, 530 Pa. 335, 609 A.2d 132 (1992) are also distinguishable from this case. In the 1981 decision, appellants argued for changes to the reapportionment plan that would result in a *greater deviation* from the population ideal than the plan it challenged.⁵ Id. at 667. Noting that "the Pennsylvania Constitution plainly states that districts shall be 'as nearly equal in population as practicable,'" the Court rejected the petition. Id. In an argument that is contrary to the one the 2011 petitioners mount, appellants challenging the 1991 Reapportionment Plan argued that the Court should "*require greater population variances* to protect the sanctity of political subdivision borders." In re 1991

⁴ Because the Levin decision did not address the petitioners' particular challenges to the 1971 reapportionment plan, it is difficult to identify differences between those challenges and the present one. Notably, however, three justices filed separate dissenting opinions, two of whom focused primarily on the Article 2, Section 16's prohibition against the unnecessary division of political subdivisions. Levin, 293 A.2d at 24-28 (Jones, C.J. and Pomeroy, J, dissenting).

⁵ The appellants asked the court to review "whether there is a standard of **population deviation greater than that adopted by the Commission**, but less than the maximum deviation permissible under the federal Constitution, **which would more closely achieve the goals of compactness and undivided political subdivisions.**" Id. at 667.

Legislative Reapportionment Commission, 530 Pa. 335, 609 A.2d at 349 (emphasis added). Here, the sanctity of political subdivision borders can and should be protected with population variances essentially the same as those in the Commission's Final Plan.

Unlike the appellants in the 1981 and 1991 challenge to the Commission's Final Plan, petitioners respect the need to achieve "as nearly equal population as practicable" in the Commonwealth's legislative districts. Petitioners show by their Section 16 Plans that the same level of population equality can be achieved while simultaneously adhering to the Constitution's prohibition on the division of political subdivision unless "absolutely necessary." In proposing a plan that reduces the number of divisions by 384 in the House and 74 in the Senate while touting population deviations of 3.471% in the Senate and 5.872% in the House, the Section 16 Plans offer concrete and objective evidence of that the Commission's Plan is not "absolutely necessary."

Finally, the Supreme Court's decision in Albert, 567 Pa. 670, 790 A.2d 989 (2002) does not dictate a rejection of Petitioner's constitutional challenge to the 2011 Final Plan. Albert consolidated numerous petitions that challenged the Commission's reapportionment plan on a piecemeal basis. This Court stressed that "under a proper constitutional analysis," the challenged reapportionment plan should be analyzed as a whole. Id. at 995. Because the Albert petitioners "focused primarily on the impact of the plan *with respect to their particular political subdivision*," the Supreme Court refused to find that the Commission had acted "contrary to law." Id. (emphasis added). In contrast, Petitioners in this action have considered the 2011 Reapportionment Plan in its entirety. Their exhaustive analyses, displayed in Exhibits C, D, E, and F to the Petition, raise a state-wide challenge to the fundamental compliance of the Final Plan to its constitutional mandate. The Section 16 plans provide comprehensive evidence of the

failure of the Commission's Final Plan to satisfy the necessity, compactness, and contiguity elements of Article 2, Section 16 of the Pennsylvania Constitution and the minority-majority requirements of federal law under the VRA and cases interpreting the VRA

The Final Plan violates Section 16 on a state-wide basis by creating hundreds of splits of counties, cities, incorporated towns, boroughs, townships and wards that are not "absolutely necessary" to achieve any constitutionally permissible objective of the Commission. The Final Plan also violates Section 16 on a state-wide basis by failing to offer any "specific explanation for why the constitutional prerequisites of compactness and respect for political subdivisions cannot be accommodated simultaneous with the maintenance of substantial equality of population and enforcement of voting interests of protected groups in the manner prescribed by federal law." Albert, 567 Pa. at 688(Saylor, J., concurring; joined by Castille, J., and Eakin, J.). This Court's precedent, including Albert, make clear that compliance with Section 16 requires a balance between "the overriding objective of substantial equality in population among districts," "concerns for compactness and adherence to a political subdivision line," and compliance with federal voting requirements. Id. at 677. Determining whether a plan complies with the Section 16 and federal requirements requires analysis of the plan "as a whole." Id. at 685.

The Commission's apparent desire to limit the number of changes to the voting districts established in 2001 also cannot justify its flagrant violation of Section 16's mandate to preserve political subdivisions. As this Court noted in Albert, the "continuation of pre-existing legislative districts" should not be a significant factor in evaluating a reapportionment plan. Id. at 686-687. Under Section 17(a) of Article 2, the Commission is created for the express purpose of "*reapportioning the Commonwealth*," not for the purpose of preserving existing districts or the jobs of incumbents.

The excessive number of subdivision splits also cannot be justified on the theory that the total numbers of splits are in line with the total numbers of splits under the 2001 reapportionment plan that this Court approved in Albert. The Albert decision made clear that it had *not* been presented with a meaningful challenge to the Commission's plan "as a whole." In fact, no prior decision of this Court compares a plan proposed by the Commission to a state-wide plan developed solely on the basis of permissible Section 16 considerations. This Court's approval of prior reapportionment plans has no bearing on the present Petition for Review. Analysis of the Final Plan *as a whole* establishes that the Commission acted contrary to law by creating hundreds of subdivision splits that are not "absolutely necessary." Accordingly, the Final Plan must be remanded.

**F. THE COMMISSION'S 4-1 VOTE IS NOT ENTITLED TO BLIND
DEFERENCE**

In Albert, several members of this Court expressed that the 2001 reapportionment plan "test[ed] the outer limits of justifiable deference." 567 Pa. at 688 (Saylor, J., concurring; joined by Castille, J., and Eakin, J.). They further cautioned that "the Court should not occupy an unduly passive role" in the vindication of essential constitutional precepts under Section 16. Id. Given the numerous constitutional deficiencies affecting the instant Final Plan "as a whole," the results in Albert and prior reapportionment cases discussed therein do not compel a decision upholding this Plan. On the contrary, a decision rejecting this legitimate constitutional challenge, in the absence of a valid explanation as to why the excessive divisions are "absolutely necessary," would extend unprecedented deference to the Commission and establish a seemingly irrebuttable presumption of constitutionality in its actions. The five-person Commission, whose

Plan is not subject to review by the General Assembly, is not entitled to such a high level of deference.

In reviewing legislative actions, this Court has applied a presumption of constitutionality only to “legislation duly enacted by the General Assembly.” Pa. Turnpike Com’n v. Com., 587 Pa. 347, 362-363, 899 A.2d 1085 (2006) (Castille, J.) (citing Com. v. Mockaitis, 575 Pa. 5, 834 A.2d 488, 497 (2003); Purple Orchid v. Pa. State Police, 572 Pa. 171 (2002); Commonwealth v. Cotto, 562 Pa. 32 (2000); 1 Pa.C.S. § 1922(3)). That is, only laws that have been passed by a vote of “a majority of the members elected to each House,” (Const. Art. 3, § 4), are entitled to such extraordinary deference.

Here, by contrast, Petitioners seek meaningful review of an action taken by a five-person Commission. Instead of a majority vote of the General Assembly, the Final Plan was passed on the votes of four individual members. Moreover, the procedures under Section 17 do not provide the General Assembly with any opportunity to review, approve, or reject the Final Plan. Therefore, the reasons underlying this Court’s deference to statutory enactments achieving a majority vote of the Commonwealth’s duly elected representatives, (see Com. ex rel. McCormick v. Reeder, 171 Pa. 505, 513-514, 33 A. 67, 68 (1895), do not apply to the Final Plan. This Court’s opinion in Erfer v. Commonwealth, 568 Pa. 128, , 794 A.2d 325 (2002), is instructive. Petitioners in that case challenged an act passed by majority vote of the General Assembly redrawing federal congressional districts. The Court determined that the legislative enactment of the Congressional redistricting plan was entitled to a presumption of constitutionality. Id. at 137-38 (citing Commonwealth v. Means, 565 Pa. 309 (2001)). However, the Court distinguished State reapportionment plans and specifically acknowledged the concern articulated in Justice Saylor’s *Albert* concurrence that the Court “not occupy an

unduly passive role” in adjudicating State constitutional challenges like those at issue in this case. *Id.* at 141-42 & n.4. Although the Assembly “assign[ed] the responsibility for reapportioning the Legislature to such a commission,” Com. ex rel. Specter v. Levin, 448 Pa. 1, 6-7 (1972), individual plans issued by the Commission pursuant to that delegation of authority are not entitled to blind deference in the face of a legitimate constitutional challenge.

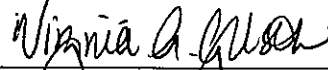
CONCLUSION

Tables, maps, and statistics are the tools of a state-wide analysis for any reapportionment plan. But the effect of the decision whether the Final plan passes constitutional muster and abides by the law necessarily rests upon the individual voter—whose right as one person to one vote is intended by the Constitution of this Commonwealth to be exercised in a small, curtained booth in his own county, his own municipality, and his own election ward. The right to equality in representation is intended to carry to Harrisburg the authority derived from the voters in those wards, municipalities, and counties, to make laws that benefit them and their local concerns, as well as the Commonwealth as a whole. The Petitioners ask this Court to protect their right to vote in the manner the Constitution intended and not to strip local communities across the Commonwealth of the ability to organize and be represented effectively by their state legislators.

The Petitioners ask that this Court fulfill its historic duty of protecting values explicitly embedded in the Constitution, placed there to safeguard them from the persistent pressures of political interests. They ask the Court to follow the command of Section 16 that unity of voice in local communities not be divided unless absolutely necessary to protect equality of their vote, contiguousness and compactness of their districts, or the federally protected voting rights of minorities. If the Court fulfills this duty, it will reject the Commission’s Final Plan and remand it to the Commission with instructions to comply with each mandate of the Pennsylvania Constitution.

Dated: January 13, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2012, I caused a true and correct copy of the foregoing Brief of Petitioners and all supporting documents to be served via electronic mail pursuant to the Court's January 12, 2012 Order on the following:

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